



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Air Inc.
File: B-236334.7; B-236334.9; B-238220.5;
B-238220.6; B-238385.2
Date: June 11, 1990

D. A. Dean, for the protester.
Roger D. Waldron, Esq., Office of General Counsel, General Services Administration, for the agency.
Charles W. Morrow, Esq., and Andrew T. Pogany, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. The General Accounting Office will not review a contracting agency's determinations that a small business is nonresponsible or the agency's subsequent assessment of allegedly new information regarding the firm's responsibility, where the protester had the opportunity to present this information before the Small Business Administration under the certificate of competency program, but failed to do so.
2. Protest that contracting agency made awards at excessive prices is denied where the agency determined the prices to be reasonable after comparing prices, considering the procurement history, and considering market conditions, and the protester has not demonstrated that the agency's determination was unreasonable.

DECISION

Air Inc. protests the rejection of its bids under several invitations for bids (IFB) issued by the General Services Administration (GSA), for various pneumatic power tools. GSA found Air nonresponsible. Air also protests that certain awards under these IFBs were made at excessive

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prices.^{1/} With regard to the IFBs in which Air is protesting the nonresponsibility determinations, Air alleges that GSA did not consider new information bearing on its responsibility which it furnished to GSA while the Small Business Administration (SBA) was considering whether to issue any certificates of competency (COC).

We deny the protests.

These IFBs were issued by CSA for various pneumatic power tools that were incorporated in separate line items under each of these solicitations, which contemplated awards on an item-by-item basis. Under the line items for which Air was determined to be the low bidder, GSA determined that Air was nonresponsible based upon several plant facilities reports (PFR) that recommended no award to Air. The PFRs revealed that Air had an inadequate quality control system and past performance record because it had been terminated for default on nine purchase orders and had been canceled on two purchase orders under GSA contracts; Air had also received two safety alerts concerning defective sanders, and nine quality complaints from user agencies.^{2/} Also, under one

^{1/} Under IFB No. FCEP-BP-F8111-2S (F8111-2S), Air protests being determined nonresponsible for line item 16, for a portable pneumatic sander disk, and line item 17, for a portable pneumatic circular saw. Air also protests that awards for line item 2, for a pneumatic drill, and line item 16 were made at excessive prices under this IFB. Under IFB No. FCEP-BG-J2492-S (J2492-S), Air protests being determined nonresponsible for line items 1 and 3, for portable pneumatic hammers, and that awards were made at excessive prices. Under IFB No. FCEP-BG-890065-S (890065-S), Air protests being determined nonresponsible under line item 4, for a portable pneumatic hammer.

^{2/} For each instance in which it was determined to be nonresponsible, Air filed an agency-level protest against the PFR report and the nonresponsibility determination. However, GSA denied these protests principally because, in each case, the SBA had declined to issue Air a COC.

IFB, GSA's "Financial Survey" recommended no award because Air had negative working capital, light net worth, and heavy debt in relation to net worth.^{3/}

Because Air is a small business, for each determination of nonresponsibility, GSA made a referral to the SBA, which is conclusively authorized to review the responsibility of small businesses for consideration under the COC program. See 15 U.S.C. § 637(b)(7) (1988). Although Air filed COC applications with the SBA, in each instance, the SBA declined to issue Air any COCs due to unsatisfactory capacity since SBA found that Air's less than satisfactory performance on previous government contracts did not assure that the requirements of the proposed contracts would be satisfactorily met.

Air argues that the PFRs which served as the basis for GSA's nonresponsibility determinations contained various derogatory, misleading, and erroneous information. For example, Air alleges that three of the purchase orders terminated for default were based upon GSA's erroneous interpretation of the specifications and that these default terminations have now been converted to terminations for convenience. Further, Air contends that the late delivery terminations on the other six involved extenuating circumstances and are under appeal. Air also states that the canceled purchase orders should not have been listed on the PFRs, since they were canceled for the convenience of the government. Moreover, Air argues that the safety alerts did not evidence an overall problem and that the nine quality complaints, noted in the PFRs as deficiencies, were listed by the agency only to support the negative tone of the PFRs. Air also contends that GSA, in determining it nonresponsible under these IFBs, did not consider new information bearing on its responsibility that allegedly

^{3/} Under IFB No. F8111-2S, GSA's referral of Air's nonresponsibility to the SBA was based upon capacity and credit. While Air did obtain a loan subordination agreement which resulted in a positive Financial Survey report on December 20, GSA nevertheless rejected Air as nonresponsible because the SBA declined to issue Air a COC due to Air's unsatisfactory capacity. GSA advises that under IFB No. F8111-2S the award of item 17 was canceled on January 3, 1990, and that therefore the protest regarding this item is academic. Awards of the remaining items were withheld, except for those items under protest by Air concerning awards at allegedly excessive prices.

discredited the information contained in the PFRs which it furnished to GSA in a letter dated December 15, 1989.4/

Air had the opportunity during the COC process to present to the SBA its allegations that the PFRs contained erroneous or misleading information and that GSA failed to give proper consideration to the information contained in Air's December 15 letter. It elected not to do so. The SBA, not our Office, has statutory authority to review a contracting officer's finding of nonresponsibility and the SBA's determination to issue or refuse to issue a COC is conclusive with respect to all aspects of a small business concern's responsibility. See Cosmodyne, Inc., B-224009, Nov. 18, 1986, 86-2 CPD ¶ 623.

Once the referral to SBA was made, it was incumbent upon Air to establish its responsibility during the COC process, which is available to provide small businesses with protection against unreasonable or bad faith determinations of responsibility. See Commerce Funding Corp., B-226114, Oct. 2, 1989, 89-2 CPD ¶ 287. Here, Air does not offer any explanation for why it failed to present these same allegations to the SBA which it now raises regarding these PFRs, including those contained in the December 15 letter.5/ While Air argues that the SBA could not reverse

4/ While Air argues that GSA did not consider its December 15 letter, the record indicates that GSA did consider the information in the letter before making the final nonresponsibility determinations and rejecting Air's bids under IFB Nos. J2492-S and 890065-S. In each instance, GSA determined that the December 15 letter did not constitute the type of new and compelling information necessary to overturn its prior nonresponsibility determination.

5/ Air's December 15 letter to GSA reflects essentially the same allegations that Air raises here regarding the PFRs which it apparently chose at that time to raise only with GSA rather than the SBA. As of December 15, with the exception of IFB No. F8111-2S, the SBA was either still considering or had not yet begun to consider Air for COCs in these cases. Further, under IFB No. F8111-2S, Air was aware of the allegedly defective PFR, issued under that solicitation on October 23, 1989, well before the SBA declined to issue a COC.

GSA's interpretation of the specifications or determine the validity of safety alert determinations or quality complaints, Air is mistaken about the nature of the COC process since, as previously noted, the SBA is authorized to determine all aspects of a firm's responsibility. Therefore, we find that Air did not properly avail itself of the COC process by failing to present the relevant information to SEA during the COC process.

Next, Air argues that GSA made awards at excessive prices for item Nos. 2 and 16, under IFB No. F8111-2S, and item Nos. 1 and 3, under IFB No. J2492-S. Air contends that the determination of price reasonableness for these items was improper because GSA did not consider the past price history on the items. Under IFB No. F8111-2S, Air states that for item 2 the last purchase price was \$116 whereas the current award is for \$165. For item 16, Air alleges that, under the prior procurement, bids higher than \$160 were rejected as excessive in price while the current award is for \$170. Under IFB No. J2492-S, Air argues that the price for items 1 and 3 has unreasonably increased from \$207 and \$297, respectively, to \$527.50 and \$530, respectively.

GSA reports that the award prices for these items were determined to be fair and reasonable after comparing prices of the remaining higher bidders, considering the past procurement history, including performance difficulties encountered by Air in preceding contracts, and considering subsequent increases in the Producer Price Index and current market conditions, as well as the impact of additional requirements. GSA reports that Air, the prior producer, has had a history of submitting unrealistically low prices and that GSA did not find their bid prices to be a credible measure of price reasonableness because Air had experienced performance difficulties in the past and was determined to lack capacity by the SBA. Moreover, GSA advises that the items under IFB No. J2492-S were repurchases of quantities terminated under prior Air contracts and thus Air was precluded from bidding any higher than its previously terminated contracts prices.

A determination concerning price reasonableness is a matter of administrative discretion that we will not question unless the determination is unreasonable. Nationwide Roofing & Sheet Metal Co., B-234222.2, June 22, 1989, 89-1 CPD ¶ 588. An agency properly may base a determination of price reasonableness upon a comparison with government

estimates, past procurement history, current market conditions, or any other relevant factors, including any which have been revealed in the bidding. Id. Here, after considering Air's allegations, we do not find that it has demonstrated that GSA's determination of price reasonableness was improper. Specifically, the only evidence of price unreasonableness that the protester has presented is its own prior prices under defaulted or improperly performed contracts. We are unpersuaded by this evidence.

The protests are denied.


for James F. Hinchman
General Counsel